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No. 84-757

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

-against-

EDWARD I. KOCH, as Mayor of the City of New York, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The Court of Appeals
Of The State of New York

RESPONDENTS' BRIEF IN OPPOSITION

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January 17, 1985.

QUESTION PRESENTED*

Was the application of offensive collateral estoppel — a matter ordinarily within the "broad discretion" of the trial courts Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) — so fundamentally unfair as to constitute a denial of due process because the dispositions of the Small Claims Court cases brought by plaintiffs pro se were inconsistent with the judgment after plenary trial in New York's highest trial court, upon which the estoppel was based?

*Parties to the proceeding in the court below, in addition to petitioner, are respondents as follows: Edward I. Koch, as Mayor of the City of New York, The City of New York, New York City Health and Hospitals Corporation, New York City Off Track Betting Corporation, Board of Education of the City of New York, Board of Higher Education, City University of New York, New York City Housing Authority, Triborough Bridge and Tunnel Authority, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Authority, Metropolitan Transportation Authority, The Long Island Railroad Company, Metropolitan Suburban Bus Authority, and Consolidated Rail Corporation.

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REASONS FOR DENIAL OF THE WRIT

The low quality of the small claims dispositions

Petitioner's argument of unfairness in the application of offensive collateral estoppel when the underlying finding "is contradicted by a number of findings in the defendant's favor," ignores the relative quality of the findings involved. Indisputably, a prior inconsistent judgment is a factor to be considered in the determination of the applicability of offensive collateral estoppel, and it may dictate inapplicability, as this Court has indicated, where a prior losing defendant had little incentive to defend vigorously or lacked procedural opportunities which, had they been available, could readily have caused a different result. Parklane Hosiery Inc. v. Shore, 439 U.S. 322, 330-331. But the same elements which would render insignificant a present defendant's prior defeat should also apply to its prior victory over a plaintiff insufficiently motivated or equipped to prosecute vigorously.

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The petition tells the Court nothing of such matters in the inconsistent cases, except for what would be gleaned only from an actual reading of the memoranda to which the Court is referred (Pet., p. 4), i.e., that plaintiffs therein were lay persons in Small Claims Part appearing pro se, under the burden of establishing gross negligence in a specialized and technical activity such as the transmission of electricity to the New York City metropolitan area, and relying entirely upon reports, including one of petitioner's investigation of its own conduct, which would not be admitted into evidence under normal rules.

There is no suggestion that the evidentiary records in those cases were substantially similar to that in Food Pageant, Inc., v. Consolidated Edison Co., Inc., 54 NY2d 167, 429 N.E.2d 738 (1981), the New York Supreme Court action which held petitioner grossly negligent and by the judgment in which it has here been collaterally estopped. As the record in this case reveals, the Food Pageant trial "lasted nine days, with approximately 1300 pages of

testimony being taken." Among the witnesses were seven of defendant's employees, at least three of whom were called by plaintiff. Cf. Carr v. District of Columbia, 646 F2d 599, 606-607 (D.C. Cir., 1980, applying offensive collateral estoppel despite a prior inconsistent judgment based upon an "incomplete record" made at a time when the search for evidence was not yet completed).

As the New York Court of Appeals put it, referring to petitioner's cited cases, they were "tried in Small Claims Part of the Civil Court of New York City as to which informal and simplified procedures are applicable and which by express statutory provision are not to be deemed an adjudication of any fact at issue (other than the amount involved) with respect to any other action." (Pet., p. 5a, footnotes omitted).

Among the "informal" procedures so referred to were those of a court "not ... bound by ... rules of ... evidence" (New York City Civil Court Act §1804). The "express statutory provision" referred to by the New York Court of Appeals is New York

City Civil Court Act §1808, which provides "A judgment obtained under this article may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court."

In short, the realities of small claims litigation are such that it is the public policy of the State of New York that the "inconsistent" adjudications cited to this Court are worthless for any purpose other than the disposition of the amounts involved in the claims therein. They are "not otherwise [to] be deemed an adjudication of any fact at issue or found therein in any other action or court." Thus petitioner in effect requests this Court to consider substituting its judgment for that of New York's highest court in regard to the inherent worth of an inferior state court determination as an adjudication of fact.

Petitioner's strong incentive and advantaged position for defense in Food Pageant.

Compare the motivations and abilities of the pro se plaintiffs in the small claims cases with those of petitioner in the New York Supreme Court action, Food Pageant. The Court is told that Food Pageant involved asserted damages of $81,000 (Pet., p. 3), an oblique reference to the comments in Park Lane Hosiery Co. v. Shore, (439 U.S. 322 at 330) regarding incentive to defend vigorously. What the Court has not been told is that within a week of the blackout, which began on the night of July 13, 1977, two class-action lawsuits had been filed, "one seeking $1 billion in damages" from Con Ed and the other, naming Con Ed and the City, "seeking an unstated amount in damages". By September of 1977 some 18,000 Con Ed customers had filed claims "asking for millions of dollars in damages, mostly for food spoilage".

When the case went to trial, more than a dozen years had passed since B.R. DeWitt, Inc. v.

Hall, 19 NY2d 141, 225 N.E.2d 225 (1967), sanctioned the use of collateral estoppel offensively; and Hart v. American Airlines, Inc., 61 Misc 2d 41, 304 N.Y. Supp 2d 810 (Sup. Ct., 1969), had soon applied B.R. DeWitt to multiple claims arising out of a passenger airplane crash. A maximum defense effort was clearly indicated.

Just as there was incentive for maximum defense, petitioner was superbly equipped to mount it. There was no contradiction of the following averment in the principal affidavit submitted in support of plaintiffs' motion for summary judgment:

> Con Edison was in a uniquely advantageous position to prepare its defense in the Food Pageant action. Most of the principal witnesses with respect to the events surrounding the blackout were either its employees or those of the New York Power Pool (of which Con Edison is a member). Similarly, the bulk of the documentation respecting those events was in the possession of Con Edison or the New York Power Pool. Further, at the time of the Food Pageant trial, Con Edison had already completed its own investigation into the cause of the blackout and had also participated in a series of City, State and federal investigations and hearings concerning the matter."

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The last of the three reports here referred to by petitioner (Pet., p. 4) had been filed in January of 1978. Trial in Food Pageant was not to begin until April of 1979.

The sham hint of error in Food Pageant

Petitioner asserts that in Food Pageant it was prevented from presenting evidence of "exculpatory circumstances tending to show that the blackout resulted from causes beyond [its] control." It refers to its trial counsel's opening to the jury wherein he referred to "certain substantial physical, political and financial restraints which influence the system reliability of Con Edison; and that these restraints included the failure of the City of New York to allow Con Edison to build plants in the City." (Pet., p. 3)

However, the Food Pageant record reveals no effort to introduce specific evidence of the restraints. No offer of proof was made. When the adverse judgment was appealed to New York's intermediate appellate court, which had power to

reverse not only for error of law, but also, in the exercise of discretion, in the interest of justice, the matter was not mentioned. Petitioner's brief to that court was signed and argued by a lawyer well-known to be able and experienced in appeals from judgments entered after trial of negligence cases.

Moreover, the "restraints" here mentioned were unrelated to the basis upon which petitioner was held liable in Food Pageant. There, the New York Court of Appeals wrote (52 NY2d, at 173-174, 429 N.E.2d, at pp. 740-741):

> In support of its contention that defendant had acted with gross negligence, plaintiff alleged and proved the existence of several circumstances under defendant's control which could have contributed to the eventual blackout. It was well within the competence of the jury to evaluate defendant's actions based upon the factual presentation alone. Chief among these actions was the behavior or lack of action of Con Edison's system operator on the night of the blackout. Within seven minutes of the initial lightning bolt which struck the Con Edison system at 8:37 P.M., the New York Power Pool was in communication with Con Edison's employee, William Jurith. Under the agreement between the power pool and Con Edison, during times of major emergency the utility was to put into effect the directions of the senior pool dispatcher. Following the second lightning bolt the pool directed Jurith to reduce voltage by "shedding

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load". Prior to the blackout, which occurred at approximately 9:30 P.M., several similar requests were made by the power pool to Con Edison to shed load. It was charged, with support in the record, that these directions were not complied with. The actions of Con Edison's employees on the night of the blackout, and Con Edison's staffing decisions, could properly be judged by the members of the jury unaided by expert testimony to clarify the standard of care.

CONCLUSION

The Petition Should Be Denied.

January 17, 1985.

Respectfully submitted,

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